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No. 95-1956

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL., PETITIONERS,

v.

STATE OF SOUTH DAKOTA AND CITY OF OACOMA, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR LOWER BRULE SIOUX TRIBE AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I

QUESTION PRESENTED

Whether Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 465, which authorizes the Secretary of the Interior to acquire interests in real property "for the purpose of providing land for Indians," is an unconstitutional delegation of legislative authority.

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INTEREST OF THE LOWER BRULE SIOUX TRIBE

The United States Court of Appeals for the Eighth Circuit has declared 25 U.S.C. § 465 to be "an unconstitutional delegation of legislative power." Pet. App. 2a. The case was reported as *South Dakota v. United States Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995). A panel of the Eighth Circuit concluded that Congress violated the "nondelegation doctrine." Under United States Constitution Article I, § 1, all legislative powers are vested in the Congress. The court held that, when

Congress enacted § 465 in 1934, Congress violated this constitutional provision by failing to provide adequate standards to govern the Secretary of Interior's (hereinafter "Secretary") implementation of the statute. Pet. App. 9a-13a. Section 465 authorizes the Secretary "in his discretion" to acquire land for Indian tribes.

Amicus Curiae, the Lower Brule Sioux Tribe, is and at all times has been a sovereign American Indian tribe, which has entered into numerous treaties with the United States. It has been a federally-recognized Indian tribe, and is a constituent band of the Great Sioux Nation. It is located in the State of South Dakota at Lower Brule.

The land at issue was purchased by the Lower Brule Sioux Tribe on or about March 13, 1990. The land, part of which is within the municipal limits of Oacoma, South Dakota, consists of approximately 91 acres and is located about seven miles south of the current boundary of the Lower Brule Sioux Tribe Reservation. The Lower Brule Sioux Tribe subsequently requested that the Secretary acquire this land in trust status for the Tribe. Pet. App. 32a. On November 30, 1992, the Secretary acquired title to the land. Pet. App. 40a. That acquisition is the subject of this lawsuit, filed by the State of South Dakota and the City of Oacoma (hereinafter "respondents"), that spawned the certiorari petition the Solicitor General filed.

The Lower Brule Sioux Tribe was not a party below. However, on December 20, 1995, the Lower Brule Sioux Tribe filed a "Statement" with the Eighth Circuit supporting the Secretary's position that the court should vacate its ruling declaring 25 U.S.C. § 465 to be unconstitutional.

Obviously, the Lower Brule Sioux Tribe has a keen and, indeed, unique interest in the disposition of this case. The decision directly impacts the 91 acres of land that are the subject of this litigation. Approximately 110,000 other acres of land that the federal government holds in trust for the Lower Brule Sioux Tribe will likely also be impacted. Indeed, immediately after the Eighth Circuit's ruling, the Lyman (South Dakota) County Treasurer sent "past due" notices to the Lower Brule Sioux Tribe, seeking payment of taxes for lands that the United States holds in trust for the Tribe.

In accordance with Supreme Court Rule 37, the Lower Brule Sioux Tribe has sought and obtained written consent to file this Brief from the Department of the Interior, the State of South Dakota, and the City of Oacoma. The Tribe has filed the originals of these letters with the Clerk.

STATEMENT

1. The Lower Brule Sioux Reservation and the Reservation's boundaries were created by Congress in 1889. Act of March 2, 1889, ch. 405, 25 Stat. 888. The 91 acres of land at issue were in 1890 the location of the first Lower Brule Agency of the Lower Brule Sioux Tribe. Herbert T. Hoover, *Wildlife on the Cheyenne River and Lower Brule Sioux Reservations: A History of Use and Jurisdiction* 90 (1992). The Lower Brule Agency remained on the land through 1893, and then was moved by the federal government closer to the center of the Tribe's property. *Id.* at 91.

Primarily because of the federal policies mandated in the Indian General Allotment (Dawes) Act of 1887, ch. 119, 24 Stat. 388, the Tribe lost ownership of the land in 1893, even though it was within the Tribe's historical land base. The

Dawes Act led to a massive transfer of ownership of tribal lands to non-tribal persons. This proved disastrous for the tribes and their members, and severely damaged the stability of many tribal communities. *Hodel v. Irving*, 481 U.S. 704, 707 (1987).

The allotment program was terminated in 1934 by the Indian Reorganization (Wheeler-Howard) Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479) (hereinafter "IRA"). Congress therein addressed the precipitous and catastrophic loss of tribal lands resulting from the Dawes Act. Specifically, Congress prohibited the Secretary from allotting any further lands to tribal members. 25 U.S.C. § 461. In addition, in 25 U.S.C. § 465, Congress authorized the Secretary to begin purchasing land for tribes to help restore what they had lost:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands . . . within or without existing reservations, including trust . . . allotments . . . for the purpose of providing land for Indians.
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> * * * * *
>
> Title to any lands or rights acquired . . . shall be taken in the name of the United States in trust for the Indian tribe . . . and such lands or rights shall be exempt from State and local taxation.

In enacting the IRA, Congress sought to give Indian tribes a chance to develop the initiative destroyed by a century of oppression and paternalism. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973). Congress sought to halt the loss of Indian lands that had occurred under the allotment

statutes. *Chase v. McMasters*, 573 F.2d 1011, 1016 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978). Under § 465, funds are appropriated, except that Congress has precluded use of the funds to acquire land relating to certain Navajo reservations.[1]

In 1934, the Lower Brule Sioux Tribe was incorporated pursuant to the IRA. Act of June 18, 1934, ch. 576, 48 Stat. 984. In 1935, the Tribe's constitution was approved by the Secretary of Interior. Felix S. Cohen, *Handbook of Federal Indian Law* 470 (1986).

The Lower Brule Sioux Tribe Reservation currently encompasses approximately 236,000 acres of land, of which approximately one-half is owned for Tribal use. Approximately 110,000 of these acres are owned by the federal government in trust for the Tribe. The Reservation consisted of approximately 447,000 acres until the allotment process established by the Dawes Act and other federal programs reduced the acreage to its current size. *Lower Brule Sioux Tribe v. South Dakota*, 917 F. Supp. 1434, 1441 (D.S.D. 1996).

2. Consistent with the purposes of § 465, in 1990 the Lower Brule Sioux Tribe purchased the 91 acres of land. Thereafter, in March 1990, the Tribe submitted an application under 25 U.S.C. § 465, asking the Secretary to acquire the land in trust status for the Tribe. The Lower Brule Sioux Tribe explained the purposes for which the land would be used, including creating an industrial park, enticing businesses to

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[1] In *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255 (1992) (citing 25 U.S.C. § 465), the Court discussed how passage of the IRA returned Indian tribes to a principle of tribal self-determination and self-governance, restored unallotted Indian lands to tribal ownership, and authorized the federal government to acquire, on behalf of the tribes, lands within or outside existing reservations.

relocate, providing preferential employment opportunities for Indians, and providing increased economic benefits to nearby reservations and counties. Pet. App. 38a.

The Secretary sent letters to the respondents, inviting them to submit comments. Pet. App. 32a. Both the state and city filed comments on April 26, 1990. Pet. App. 32a-34a. On June 29, 1990, the Lower Brule Sioux Tribe refuted the concerns that had been raised by the respondents. Pet. App. 38a-40a. On November 30, 1992, the Secretary took title to the land in trust for the Tribe. Pet. App. 40a.

3. In July 1992, the respondents filed this action in South Dakota against the United States Department of the Interior and certain of its officials (collectively "Interior"), seeking judicial review under the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.* Pet. App. 2a. Respondents also asserted that 25 U.S.C. § 465 was unconstitutional. Pet. App. 3a. However, before the land was acquired in trust by the Secretary, respondents did not seek relief from the court to block the proposed acquisition. On April 1, 1994, the district court (Battey, C.J.) granted Interior's Motion to Dismiss, concluding that the United States had not waived sovereign immunity, and that the statute was constitutional. Pet. App. 31a-52a. The court discussed in detail how various offices of Interior had supported or approved the Tribe's request to the Secretary to acquire the land. Pet. App. 37a-40a.

4. The respondents appealed that ruling to the Eighth Circuit. After briefing and oral argument, the court declared

25 U.S.C. § 465 unconstitutional.[2] Pet. App. 1a-30a. Judges Loken and Magill held that § 465 does not set perceptible boundaries or intelligible principles within the "four corners" of the statutory language, to constrain the Secretary's authority. Pet. App. 7a. The court concluded that Congress failed to articulate the public use that justifies an acquisition. Pet. App. 9a. Curiously, the panel admitted that the legislative history of § 465 suggests Congress did not intend to delegate unrestricted power to acquire land for Indians. *Id.* The panel also concluded that the Secretary's regulations, 25 C.F.R. Part 151, do not place restrictions on the purposes for which land may be placed in trust. Pet. App. 11a.

Judge Murphy dissented. She concluded (correctly in our view) that the majority's decision, overturning a statute that has been in place for over sixty years, places in doubt "the status of all Indian trust land." Pet. App. 15a. She went on to find that the IRA does not convey unbridled discretion to the Secretary, even though the Act gives the Secretary broad discretion to acquire land. Pet. App. 21a. She noted that the statute directs that land must be acquired for Indians only. *Id.* She also concluded that the Secretary's authority is limited by the statute's legislative history. Pet. App. 22a. Judge Murphy nevertheless agreed that the lower court's decision was in error. Judge Murphy would have remanded the case for a ruling by the district court on the merits of respondents' APA challenge to the acquisition. Pet. App. 26a-27a.

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[2] Remarkably, the respondents only touched on the constitutional issue in passing as the last of four issues in their brief. We understand that the oral argument did not address the constitutional question that the court later decided.

5. Interior timely sought a rehearing and suggested a rehearing en banc. Pet. 63a. On February 2, 1996, the Eighth Circuit denied the petition and the suggestion for rehearing en banc, even though four judges voted to grant the suggestion for rehearing en banc. *Id.*

DISCUSSION

1. We recognize that the Court will grant a petition for certiorari "only for compelling reasons." Sup. Ct. R. 10. However, when a court holds a federal statute unconstitutional, certiorari is usually granted because of the obvious importance of the case. *United States v. Gainey*, 380 U.S. 63, 65 (1965).

The failure to grant certiorari will have dramatic and far-reaching consequences for the Lower Brule Sioux Tribe, other tribes, and indeed, the Secretary. Pending final resolution of this case, the land at issue continues to be owned in trust by the United States. A decision to deny the petition for certiorari would mean that the government's acquisition of the land for the Lower Brule Sioux Tribe would apparently be void.

More generally, the Eighth Circuit's decision seriously threatens the authority of the Secretary in his trustee capacity to protect and restore the Tribe's interest in land to which the Tribe has had a historical nexus. The decision also potentially clouds the title to millions of acres of land owned by other tribes throughout the United States.

The legal and practical consequences of a denial of the petition for certiorari include:

(i) That the intent of Congress in enacting the IRA -- to repeal the General Allotment Act and use

the Secretary's special expertise to redress disastrous policies that had stripped tribes of their land base -- will be upended, frustrating tribal acquisition of land and accelerating the stripping of the historical land base of tribes;

(ii) That the state, county, and local taxation and assessment of tribal land will potentially destroy that tribal land base -- particularly in light of the historical relegation to tribes of the least economically-productive land;

(iii) That expenditure of limited tribal funds to pay taxation of tribal land will mean funds cannot be spent for other tribal purposes, thereby hastening the impoverishment of Indian tribes;

(iv) That ongoing or final prosecutions of persons who committed crimes on federal lands could be jeopardized. See, *e.g.*, 18 U.S.C. §§ 1852, 1855;

(v) That imposition of state laws into areas of exclusive tribal and federal jurisdiction, will unavoidably encroach upon tribal self-government and internal tribal relations; and

(vi) That nationwide clouds upon land titles will result relative to lands acquired under the IRA.

Thus, title to land acquired by the Secretary for all tribes would be called into question if the Court denies the petition for certiorari. The forum for this uncertainty would be in the courts and with the Secretary. States, local governments,

and others would seize upon the finality of the Eighth Circuit's decision as a means to challenge retroactively already completed acquisitions by the Secretary. Moreover, these same entities would undoubtedly use the decision as a strong precedent to challenge future acquisitions under § 465.

Actions taken by the Secretary under § 465 are not the only decisions called into question by the Eighth Circuit's decision. Congress has repeatedly used broad language in other statutory provisions relating to federal acquisitions of lands for tribes. See 25 U.S.C. §§ 450h(a)(3), 489, 1466, 1495, and 2209. While Congress' employment of similar broad language raises a concern as to whether these provisions too are subject to constitutional challenge, we submit that Congress' repeated usage of a similar statutory scheme supports the conclusion that Congress has consistently given the Secretary broad (but not unconstitutional) discretion when acquiring land in trust for tribes. Indeed, the fact that these statutes (including § 465) are limited to assisting Indians and Indian tribes distinguishes this case from court rulings which have adopted, or given serious consideration to, "nondelegation" constitutional challenges.[3]

2. Interior has urged the Court to grant the petition for a writ of certiorari, vacate the Eighth Circuit's Judgment, and remand the case. Interior asks this Court to instruct the Eighth Circuit to vacate the district court's Judgment and remand the

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[3] The constitutionality of statutes enforced by other federal agencies may also be challenged if the Eighth Circuit's decision is not reviewed. That decision was based on statutory language that allows Interior "in its discretion" to acquire land. To the extent this statutory language formed a basis for the result reached, the word "discretion" or "discretionary" appears in over five thousand sections of the United States Code. Many of these code sections, like 25 U.S.C. § 465, represent Congressional delegations of authority to federal executive officials or agencies.

matter to the Secretary for reconsideration of his decision to acquire the land for the Lower Brule Sioux Tribe. Pet. 15, 23-27. Interior asserts that the Secretary can decide again whether to acquire the land that is now at issue, and, pursuant to the Secretary's 1996 regulations (Pet. App. 68a-69a), respondents can thereafter file a second lawsuit if the Secretary decides to reacquire the land in trust.

The Lower Brule Sioux Tribe agrees that the Court should grant the petition for a writ of certiorari and vacate the Eighth Circuit's Judgment. We also agree that the case should be remanded to the Eighth Circuit without plenary briefing and argument. However, we submit that the Court should not direct the Eighth Circuit to remand the case to the Secretary. No further decision by the Secretary is required or appropriate. Instead, the Eighth Circuit should be permitted to consider the nonconstitutional issues that it did not address.

In their appeal to the Eighth Circuit, respondents raised a plethora of arguments challenging the district court's dismissal of their action. Respondents argued: (1) the Quiet Title Act, 28 U.S.C. § 2409a, does not prohibit judicial review of the Secretary's decision to acquire the land in trust; (2) sovereign immunity does not otherwise insulate the Secretary's decision from a judicial challenge; (3) the Assistant Secretary for Indian Affairs lacked authority to acquire the land, on a number of grounds including that he allegedly ignored the purpose for which the land was taken into trust, failed properly to consult with governmental entities before taking the land into trust, accepted a submission from the Lower Brule Sioux Tribe that was inadequate, failed to demonstrate that acquiring the land in trust was essential for the planned use of the property, and did not consider local zoning codes; (4) the Secretary's decision violated the APA, because

the Secretary excluded evidence from the administrative record; and (5) 25 U.S.C. § 465 is unconstitutional. The Eighth Circuit ruled only on the constitutional issue. Pet. App. 16a.

In reaching the constitutionality of § 465, the Eighth Circuit violated a "fundamental rule of judicial restraint." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 467 U.S. 138, 157 (1984). The Eighth Circuit should not have considered constitutional arguments relating to § 465 before it attempted to resolve the statutory issues raised by the respondents. *Jean v. Nelson*, 472 U.S. 846, 854 (1985) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable" (citation omitted)).

The Eighth Circuit did not even attempt to evaluate, for example, whether the Secretary's decision to take land into trust is reviewable under the APA, and, if it is reviewable, whether the Secretary's decision was arbitrary and capricious, or an abuse of agency discretion.[4] The court should have addressed the potentially dispositive statutory issues first. Furthermore, as Judge Murphy pointed out, if consideration of constitutional issues ultimately were to become necessary, resolution of the APA reviewability issue would help provide an informed constitutional analysis of § 465. Pet. App. 17a.

Thus, if as we believe is proper, the Court vacates the Eighth Circuit's Judgment because that court improperly

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[4] The Eighth Circuit indicated that APA review likely *would* be available in this case. Pet. App. 4a n.1. The 1996 regulations (Pet. App. 68a-69a) reflect the Secretary's current position that APA review of a proposed acquisition does lie in federal district courts.

reached a constitutional issue, there remain numerous nonconstitutional issues. Previously, where the Court has ruled that a lower court improperly reached a constitutional issue, the Court has typically vacated the Judgment of the lower court and remanded the case for a lower court to consider nonconstitutional issues. *Jean v. Nelson*, 472 U.S. at 857; *Escambia County, Fla. v. McMillan*, 466 U.S. 48 (1984).

Similarly, when a federal agency has altered its legal position when a case reaches the Court, the Court has remanded the case to a lower court for a ruling, rather than directing that court to remand the matter to the agency. *Lawrence ex rel. Lawrence v. Chater*, 116 S. Ct. 604, 606 (1996) (Court did not grant Solicitor General's suggestion that the Court remand to the Social Security Administration). See also *Jean*, 472 U.S. at 857. Interior does not suggest any sound reason why the Court's normal procedures should be disregarded if the Court vacates the Eighth Circuit's Judgment.

Interior urges that remand to the Secretary for a new decision will somehow obviate a court deciding whether the Quiet Title Act precludes judicial review of a decision by the Secretary to acquire land in trust. Pet. 26 n.16. We respectfully disagree. First, we see no reason why this Court should embroil itself in the question of whether a lower court should decide a nonconstitutional issue earlier raised by respondents. Second, even if it were appropriate for the Court to assist the Eighth Circuit to avoid an interpretation of the Quiet Title Act, we fail to see how Interior's suggestion will solve the problem.

If the Secretary were to abandon ownership of the land at issue, and thereafter issue a new decision which reaffirms the 1992 decision to acquire the land in trust, respondents will be

obligated, under the Secretary's 1996 regulations, to file suit *before* the land is taken in trust. 61 Fed. Reg. 18,082 (1996) (to be codified at 25 C.F.R. § 151.12), *reprinted at* Pet. App. 68a-69a. Respondents would surely both file suit *and* seek an immediate injunction from the court. Absent an immediate injunction, the Secretary could acquire the land, which would, in the Secretary's view, moot the case. The Secretary believes that once land is acquired in trust pursuant to § 465, the Quiet Title Act bars a further challenge to the Secretary's decision. Pet. App. 65a. Thus, in weighing whether to issue the injunction to avoid a mootness argument, the district court will almost certainly have to determine if the Quiet Title Act would apply.

To the extent Interior is suggesting that a new decision is needed to address the regulations in place when the Secretary acquired the land in 1992, Interior does not identify why the agency's earlier decision was deficient. The Eighth Circuit is fully capable of addressing the adequacy of that decision, to the extent that respondents earlier challenged the decision in their briefs filed with that court.

In 1995, after the acquisition of the land at issue, the Secretary revised the regulations to identify additional factors to be considered in acquisitions of land in trust by the Secretary. See 60 Fed. Reg. 32,874 (1995) (to be codified at 25 C.F.R. Part 151). However, those regulations cannot be applied by the Secretary to a transaction that is already complete. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. . . . [A] statutory grant of legislative rulemaking authority to an agency will not, as a general matter,

be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms").[5] These principles have been applied to prohibit retroactive application of interpretive, as well as legislative, rules. *Health Ins. Ass'n of Am. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 1095 (1995). Thus, a remand to the Secretary would not allow for an analysis of the transaction under rules issued after the transaction was consummated.

3. Even if the Eighth Circuit correctly reached the constitutionality of § 465, the Eighth Circuit was incorrect in concluding that § 465 violates the nondelegation doctrine. The Lower Brule Sioux Tribe adopts Interior's arguments (Pet. 20-25) on that issue. In addition, on June 3, 1996, the date Interior filed the petition for a writ of certiorari, the Court issued an important nondelegation doctrine decision. Because that case was not discussed in the petition, we will address how that decision impacts on the certiorari petition.

In the just-decided case, *Loving v. United States*, 116 S. Ct. 1737 (1996), the Court established clearly that executive branch expertise and longstanding regulatory responsibility are considered when a court judges if Congress has unconstitutionally delegated legislative authority. In *Loving*, an Army private challenged the constitutionality of the President defining (in rules for courts-martial) aggravating factors regarding imposition of the death penalty. The Court held that the statute was not unconstitutional, because the authority conveyed was within "the traditional authority of the President." *Id.* at 1750. The Court explained:

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[5] We have not located any statute that authorizes the Secretary to promulgate retroactive rules in the context of § 465.

> We think . . . that the question to be asked is not whether there was any explicit principle telling the President how to select aggravating factors, but whether any such guidance was needed, given the nature of the delegation and the officer who is to exercise the delegated authority. First, the delegation is set within boundaries the President may not exceed. Second, the delegation here was to the President in his role as Commander in Chief. Perhaps more explicit guidance as to how to select aggravating factors would be necessary if delegation were made to a newly created entity without independent authority in this area. . . . From the early days of the Republic, the President has had congressional authorization to intervene in cases where courts-martial decreed death.

Id. at 1750-51.[6]

The Secretary has been responsible for implementing federal Indian policy since the Department of the Interior was created in 1849, almost 150 years ago. Cohen, *Handbook of Federal Indian Law* 119 (1982). Even before the Department was created, the Executive Branch exercised extensive authority and discretion to regulate Indian affairs, through the War Department, established in 1789. *Id.* at 108.

Over the past century-and-a-half, the Secretary has borne significant responsibility for the management of Indian lands. Notably, the Secretary implemented the disastrous policy of allotting Indian tribal lands to individual members of

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[6] If the Court remands the case to the Eighth Circuit for resolution of the nonconstitutional issues, that court should consider the impact of *Loving* if the Eighth Circuit again addresses the nondelegation issue.

the tribes under the Dawes Act, 25 U.S.C. § 348. Amendments to the Dawes Act authorized the Secretary to lease lands that had been allotted to Indians. Act of Feb. 28, 1891, ch. 383, § 3, 26 Stat. 794, 795. Finally, amendments in 1906 gave the Secretary authority to terminate the federal trust power over allotted lands. 25 U.S.C. § 349.

Given the Secretary's long experience and discretionary responsibility in the allotment and management of Indian lands under the Dawes Act, it was only logical and appropriate for Congress, in 1934, to charge the Secretary with restoring some of the approximately 100 million acres that Indian tribes had lost. The Secretary had extensive, first-hand knowledge of the land transfers that had occurred and their effect on individual tribes. Furthermore, given the Secretary's other responsibilities relating to Indians (including management of forest and grazing lands, rights-of-way over Indian lands, energy and mineral resources, fish and wildlife management, economic development and business projects, and providing many other services regarding health, education and housing), he stands in a unique position to know what trust arrangements under § 465 might best compensate tribes for their prior losses.

Congress has tacitly ratified the Secretary's 60 years of land acquisitions under the IRA, 25 U.S.C. § 465. Since 1934, the Secretary has made thousands of trust acquisitions, encompassing an estimated 9 million acres of land. Pet. App. 17. However, even though it has amended other provisions of the IRA, Congress has never disapproved the Secretary's discretionary implementation of the authority granted under § 465. Pet. App. 23 n.11.

CONCLUSION

The petition for writ of certiorari should be granted. The Judgment of the Eighth Circuit should be vacated and the case remanded to that court to address nonconstitutional issues not decided in that court's earlier decision. In the alternative, the petition for writ of certiorari should be granted and the Court should grant plenary review and set the case for briefing and argument.

Respectfully submitted.

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